M E M O R A N D U M

TO: Andre Leroux, Smart Growth Alliance

FROM: Jay Wickersham, Noble & Wickersham LLP

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RE: Summary of zoning reform bill (long version)

Provisions of the zoning reform bill

Chapters 40A, 40X, and 41: Reforms applicable to all communities

1) Allowable zoning techniques. The bill adds or expands definitions and authorizations for many useful zoning techniques, including cluster development, transfer of development rights, inclusionary zoning, natural resource protection zoning, and form-based codes. [Bill sections 1, 2, 3, 14, 15, 18, and 19]

2) Special Permits. Three significant changes are proposed, all of which would reduce the burden on local boards and applicants. The required vote is reduced from a super-majority to a simple majority; the duration of a special permit is extended from a maximum of two years to a minimum of three years; and a process for extending a permit is established. [Bill sections 13, 16, and 17]

3) Site Plan Review. Many communities already employ a form of site plan review (SPR), but because there are no explicit standards in the Zoning Act, uncertainties have plagued the SPR process. The bill adds a new section that standardizes SPR as follows: (1) decisions must be made within 95 days, with a public hearing optional; (2) when SPR overlaps with a special permit, the reviews must coincide; (3) approval is by simple majority; (4) approvals may be subject to conditions, including off-site mitigation in limited circumstances only; (5) duration shall be a minimum of two years; and (6) appeals shall be based on the existing record, not new evidence. [Bill section 20]

4) Variances. Variances offer a "relief valve" from zoning, since no local code can anticipate every piece of land or personal circumstance. Variances are particularly helpful for small-scale residential projects involving renovations, additions, or infill development. But the current Zoning Act is overly restrictive for landowners and towns. As a result, some zoning boards approve almost no variances, while others grant them liberally but illegally. This section entirely rewrites the current variance provisions; it sets reasonable procedures and criteria while still maintaining a community's discretion to condition or deny a variance, including on grounds of "self-created" hardship. The time within which a variance must be used is extended from one to two years, with one-year extensions allowed. **[**Bill section 24]

5) Vested Rights. It is appropriate and fair that when zoning changes, the law should protect development projects already in the pipeline, where a substantial investment of time and money has been made. In the Zoning Act, however, some of these protections are excessively protective, while others are unreasonably limited. The vesting loopholes for subdivisions and Approval Not Required (ANR) plans undermine thoughtful local planning and zoning modifications. Meanwhile, the vesting periods for projects seeking a building permit or special permit are unrealistically short. This section has been rewritten, based on extensive research into vested rights statutes in use around the country and American Planning Association model laws, to provide reasonable and standardized protections for development projects requiring building permits, special permits, and subdivision plans. The bill eliminates two vesting loopholes and modifies the third. The vesting periods for building permits and special permits are appropriately extended. [Bill sections 6, 7, 8, 9, 10, 11, and 12]

- Subdivision Plan Freeze: Only the proposed project is protected against zoning changes, rather than the land (as under current law). An applicant must apply for a definitive subdivision plan before the first published notice of public hearing on a proposed zoning change, and must ultimately obtain approval. But the overall length of the subdivision freeze has been maintained at eight years, unless a community seeks "opt-in" status under the new Chapter 40Y.
- ANR Plan Freeze: Under current law, the endorsement of a simple ANR plan for lots fronting on a public way – even a perimeter plan or a plan showing only a slight line change to an existing parcel – freezes any zoning change for three years. This device was recently used in the City of Northampton to preserve rights to build a porn store. It is eliminated.
- Three Lots in Common Ownership Dimensional Freeze: Up to three pre-existing adjoining lots under common ownership are protected against any zoning dimensional changes for five years. Reportedly, this was added by a legislator in the 1970s at the request of a constituent, to protect the constituent's land! It has vexed cities and towns for over 35 years. It is eliminated.
- Extended freezes for special permits and building permits. All developments require building permits, and most large projects require special permits – yet under current law, both the duration of such permits and the length of time they offer freeze protection against zoning changes, was unrealistically short. The vesting period and duration for building permits is increased from six months to two years, and for special permits from two to three years.

6) Development Impact Fees. Rationally-based impact fees are predictable for developers and can reduce local opposition to some development projects, because there is confidence that projects will bear their fair share of impacts on public facilities. This allows more types of development to be permitted as-of-right instead of undergoing the lengthy and costly special permit process. Despite being a commonly used regulatory tool across the country, impact fees are rarely used in Massachusetts due to troublesome case law and no mention in statute. This new section in the Zoning Act authorizes development impact fees, based on in-state models (Medford and Cape Cod Commission), prevailing national practice, and federal case law. The bill clearly lists the public capital facilities for which impact fees may be assessed. Affordable housing projects are exempted from impact fee. Fees must be paid into a dedicated trust fund and used within 10 years. [Bill section 21]

7) Inclusionary Zoning. Inclusionary housing programs that require the creation of affordable housing in development projects can increase diversity in local housing opportunities and help to meet local requirements under Chapter 40B. Although it is used by communities around the state, this essential smart growth tool is not currently authorized by the Zoning Act. This new section is based on best current practices. Off-site units, land dedication, or funds may also be provided in lieu of on-site dwelling units. The upper limit of affordability is households earning up to 120% of the Area Median Income (AMI). Inclusionary zoning may require some or all of the affordable units to be eligible under Chapter 40B (i.e., units limited to households with incomes up to 80% of AMI). Affordable units must be price-restricted for no less than 30 years. **[**Bill section 22]

8) Master Planning.

- Contents of master plans**.** The section is rewritten to accomplish the following objectives: (1) plan elements reflect the language of the state's Sustainable Development Principles, including public health considerations; (2) all communities must complete five required elements (goals and objectives, housing, natural resources and energy, land use and zoning, and implementation), but are free to choose among the other seven optional elements; (3) superfluous data collection is discouraged; (4) all elements must be assessed against a regional plan, if any; (5) a public hearing is required before adoption; and (6) the plan must be adopted by the local planning board and the legislative body. [Bill section 28]
- Legal effect of plans**.** Current Massachusetts law does not require zoning to be consistent with a local masterplan. As a result, many municipalities have not created or updated their plans. The bill makes masterplans an option for municipalities. But to incentivize thoughtful local planning, the bill also states that if local zoning is challenged in a lawsuit, and the judge finds that the challenged provision is consistent with a local master plan, then the provision shall be deemed to serve a public purpose. [Bill section 43]

9) Notice to Boards of Health. Although local boards of health receive notices of public hearing for subdivision projects, under the current Zoning Act they do not receive notices of projects seeking zoning approvals. This has been changed, so that boards of health will receive notice and be able to comment on variances, site plan reviews, special permits, and other approvals. **[**Bill section 25]

10) Other procedural reforms.

- Dispute avoidance. Although informal dispute resolution processes may occur now, there is no set process laid out in the Zoning Act, and no relief from either "discovery" or the open meeting law. This new section in the Zoning Act offers an "off-line" avenue for applicants, municipal officials, and the public to work with a neutral facilitator to try to resolve difficulties in a prospective development project, so that the formal approval process may later be successful for all. **[**Bill section 23]
- Appeals. Resolving appeals under current law is often expensive and slow, undermining the predictability and authority of the local process for officials, developers, and residents alike. The bill streamline the appeals language for site plan review, special permits, and subdivisions; provides for a record-based decision (rather than a decision based on new

evidence) by the court evaluating a local decision; and expands the jurisdiction of the Land Court permit session to include residential, commercial, industrial, and mixed-use projects. [Bill sections 20, 40, 41, and 42]

- Amendments**.** The current super-majority requirement (two-thirds) to adopt or amend local zoning is an undue burden for Massachusetts cities and towns, one that is unique in the U.S. The bill would allow communities to lower the vote from the super-majority default anywhere down to a simple majority. Once reduced, the majority may be subsequently raised by the majority then in place. [Bill sections 4 and 5]

11) Consolidated Permitting. Development proposals often need multiple local permits from multiple local boards, each with its own substantive and procedural requirement. The new Chapter 40X would allow applicants for larger, more complex projects (at least 25,000 g.s.f. or 25 dwelling units) to employ a consolidated permitting process. This would ensure that local boards receive common information about the project and that they have the opportunity to bring all decision-making bodies together at the beginning of a project review. More efficient reviews could result, benefitting all parties to the development review process. At the same time, each board would retain the authority to make an independent decision in accordance with its own standards. [Bill section 26]

12) Minor Subdivisions and Approval Not Required (ANR) Projects. Current Massachusetts law prevents communities from effectively planning or regulating the development of roadside land, through the uniquely permissive ANR process. No other state law allows unregulated roadside development in this fashion. Meanwhile, small residential subdivisions must undergo the same process as those with 50 or 100 lots. The bill permits a community to eliminate the ANR loophole, if it creates a less onerous minor subdivision review process for projects with six or fewer lots. A separate procedure has been developed to address minor lot line changes. [Bill sections 29, 30, 31, 32, 35, 37, 38, and 39]

- ANR reform. Communities wishing to retain ANR may do nothing and continue, but those desiring more control of these land divisions may now regulate them as subdivisions. However, until a planning board adopts rules and regulations for minor subdivision review, the old ANR process remains in effect.
- Minor subdivisions. Minor subdivisions must be defined under local regulations to include up to six new lots (a community can raise the threshold). The time limit for review is either 65 or 95 days, compared with 135 days for a full subdivision. A public hearing is optional. Standards may not exceed those for regular subdivisions, and requirements for roadway width may typically not exceed 22 feet.
- Lot line changes. Because the ANR device is routinely used to make small changes to property lines, a suitable replacement mechanism was needed. A new section permits the recording of plans for minor lot line changes, subject to specific conditions.

13) Subdivisions. The bill makes two other changes to the Subdivision Control Law:

- Subdivision Roadway Standards**.** Many local subdivision regulations require unnecessarily stringent roadway standards. These may adversely affect aesthetics, increase stormwater runoff, and inflate housing costs by imposing undue burdens on the developer. The bill establishes a rebuttable presumption that roadway standards exceeding those applicable to the construction or "reconstruction" of publicly-financed

roadways are excessive, while defining a "safe harbor" for roadway widths up to 24 feet. [Bill section 33]

- Parks and Playgrounds**.** The Subdivision Control Law is modified so that local subdivision regulations may require a dedication of up to 5% of a subdivision for park or playground use. This provision can't be interpreted to require transfer of ownership of such park or playground to a governmental unit (similar to the existing well-accepted requirements to create a roadway right of way, but without also mandating its dedication to the municipality). **[**Bill sections 34 and 36]

Chapter 40Y, Planning Ahead for Growth Act: Specific smart –growth tools applicable on a voluntary basis to opt-in communities only

14) Planning Ahead for Growth Act [opt-in]. Current zoning codes are not resulting in smart-growth development that creates adequate new housing and jobs across the Commonwealth, while protecting environmental resources and community character. The "town and country" landscape of Massachusetts is being lost to sprawl development patterns. The new chapter 40Y provides strong incentives for communities to allow prompt and predictable by-right housing and commercial development, focused in appropriate smart-growth locations, coupled with environmental and open space protections. Participating municipalities will get access to additional regulatory and fiscal resources and tools to realize their plans for sustainable development. To obtain "opt-in" status under Chapter 40Y, a community must take the following actions, and demonstrate to the regional planning agency (RPA) that it has conformed. $2 million is budgeted to communities for preparation of implementing regulations and RPAs for their reviews. Oversight, implementing regulations, and resolution of disputes would be through the Secretary of the Executive Office of Housing and Economic Development. [Bill section 27]

- Establishing a housing development district(s) in a smart-growth locations that can accommodate, through by-right development, a 5% increase the community's total number of existing housing units by-right. Minimum densities are set for single-family, duplex-triplex, or multi-family housing.
- Establishing an economic development district in smart-growth locations that permits prompt and predictable permitting of commercial / industrial development.
- Mandatory use of open space residential design (OSRD) for developments of 5 units or more on land zoned for a minimum lot-size of 40,000 s.f. per unit.
- Mandatory use of low impact development (LID) techniques for developments that disturb over one acre of land.

The following regulatory and financial tools would be authorized and available for a community's use after it has opted in:

- Reduction of the vested rights period for subdivisions from 8 to 5 years.
- Enhanced use of impact fees to support public schools, libraries, municipal offices, affordable housing, and public safety facilities.
- Authorization to enter into development agreements.
- Adoption of rate of development measures (annual caps on building permit issuance) in areas inside and outside of housing development districts.

- Adoption of natural resource protection zoning (NRPZ) at area densities of 10 acres or more per dwelling unit to protect identified lands of high natural resource value.
- Preference for state discretionary funds and grants; priority for state infrastructure investments, such as water and sewer infrastructure, school building funds, and biking and walking facilities; and requirements that the state take into consideration regional plans and local master plans in its capital spending.
- Eligibility to receive state planning funds to reimburse for costs of developing and reviewing implementing regulations.